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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANA BERENICE PALOS-MONTES, Defendant(s).	Criminal Case No. 08CR1726-LAB DATE: August 25, 2008 TIME: 2:00 p.m.. COURTROOM: 9 Before Honorable Larry A. Burns UNITED STATES' MOTIONS *IN LIMINE* TO: (A) EXCLUDE WITNESSES; (B) PROHIBIT REFERENCE TO PUNISHMENT, EDUCATION, HEALTH, AGE, AND FINANCES; (C) ADMIT EXPERT TESTIMONY; (D) ADMIT DOCUMENTS SEIZED AT THE TIME OF DEFENDANT'S ARREST; (E) BRING DRUGS INTO THE COURTROOM DURING TRIAL; (F) ADMIT EVIDENCE WITHOUT ESTABLISHING COMPLETE CHAIN OF CUSTODY; (G) PRECLUDE TESTIMONY OF CHARACTER WITNESSES; (H) PRECLUDE EVIDENCE OF DURESS OR NECESSITY; AND (I) PRECLUDE EXPERT TESTIMONY BY DEFENSE WITNESSES; (J) ADMIT TECS INFORMATION; (K) ADMIT RULE 404(B) EVIDENCE (L) RENEWED MOTION FOR RECIPROCAL DISCOVERY TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Aaron B. Clark, Assistant U.S. Attorney, and hereby files its motions *in limine* in the above-captioned case. Said motions are based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

DATED: August 18, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Aaron B. Clark
AARON B. CLARK
Assistant United States Attorney

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UNITED STATES OF AMERICA, Plaintiff, v. ANA BERENICE PALOS-MONTES, Defendant(s).	Criminal Case No. 08CR1726-LAB DATE: August 25, 2008 TIME: 2:00 p.m. COURTROOM: 9 Before Honorable Larry A. Burns UNITED STATES' STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

On May 28, 2008, a federal grand jury for the Southern District of California returned a two-count Indictment charging Defendant with importation of cocaine and possession of cocaine with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 952, 960. Defendant was arraigned on the Indictment on January May 29, 2008, and entered a plea of not guilty.

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II

STATEMENT OF FACTS

A. THE OFFENSE

On April 5, 2008, at approximately 2:00 p.m., Defendant attempted entry into the United States through the San Ysidro Port of Entry as the driver and sole occupant of a white 2000 Suzuki Vitara bearing Baja Mexico license plate #BEE1029. The vehicle was registered in her name. At the primary area, Defendant presented Customs and Border Protection ("CBP") Officer Thomas with a valid B1/B2 visa. Defendant stated she was going shopping in Chula Vista, California and gave a negative customs declaration. A computer generated referral referred the vehicle to secondary inspection.

At secondary inspection, CBP Officer Perez conducted a seven point inspection of the vehicle, which revealed a space discrepancy in the rear floor trunk. Officer Perez removed a plastic cover from the rear bumper and discovered an access panel to a non-factory compartment. Removal of the access panel revealed packages wrapped in cellophane and black carbon fiber plastic. One package that contained a white powdery substance was later field tested and tested positive for cocaine. In total, 11 packages of cocaine, weighing approximately 12.45 kilograms, were recovered from the vehicle.

B. DEFENDANT'S STATEMENT

Defendant was advised of her Miranda rights in Spanish by ICE Agent Preciado and witnessed by Agent Spillman at approximately 5:30 p.m. The entire interview was intended to be recorded, but due to a technical problem the interview was not recorded. Defendant acknowledged those rights and agreed to speak to agents.

Defendant stated that she was driving to Moreno Valley to pick up money for a Hispanic male named "Jorge." Defendant met Jorge through a mutual friend about a month earlier. Jorge was to pay Defendant $600.00 - $100.00 for gas/food and the rest for Defendant. Defendant admitted this was her fifth time driving for Jorge and second time driving to Moreno Valley by herself. The first three times she crossed with her friend Antonia, the friend who introduced her to Jorge. Her first trip was about a week after Defendant registered the Suzuki in her name (March 7, 2008).

Defendant described her second and third trips to Moreno Valley. She and Antonia met with "Payin" who would take the vehicle for about 1-2 hours and then return the vehicle. Defendant stated she did not take the vehicle to her home in Tijuana. However, Jorge knew where she lived as he came to her home several times. Defendant stated she believed Jorge was doing something illegal, and believed that she was crossing $10,000.00 each time. Defendant claimed, however, she did not ask many questions because she was worried about "knowing too much" about Jorge.

C. ANTONIA FRANCO'S STATEMENT

On June 28, 2008 and July 23, 2008, Agent Preciado met with Antonia Franco-Nunez, whom Defendant had identified as having accompanied her on her first three trips in the load vehicle. In the initial interview, Franco stated she believed that her previous trips with Defendant were to pick up money from the Riverside, California area.

In her July 23, 2008 interview, however, Franco noted that, prior to the her first trip with Defendant in the load vehicle, she was present when Defendant had asked Jorge for more than the agreed upon $600. According to Franco, Defendant openly questioned "How can I be sure you aren't going to put anything in the car?" In asking instead for $1000, Defendant also apparently noted to Jorge, "I'm the one that could get arrested at the border." Franco noted that Defendant was later told she would be paid $800 instead.

Franco also noted that on one of her trips with Defendant, Defendant had offered Franco $200 for her company on a trip from Tijuana to the Los Angeles area. During the trip, however, Defendant expressed misgivings about paying Franco $200 because the vehicle was registered in Defendant's name and Defendant would "take the fall" if something happened.

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D. DEFENDANT'S CRIMINAL AND IMMIGRATION HISTORY

Defendant is a Mexican citizen and has no known criminal history.

III

MEMORANDUM OF POINTS AND AUTHORITIES

A. THE COURT SHOULD EXCLUDE WITNESSES DURING TRIAL WITH THE EXCEPTION OF THE GOVERNMENT'S CASE AGENT

Under Federal Rule of Evidence 615(3), "a person whose presence is shown by a party to be essential to the presentation of the party's cause" should not be ordered excluded from the court during trial. The case agent in the present matter has been critical in moving the investigation forward to this point and is considered by the United States to be an integral part of the trial team. The United States requests that Defendant's testifying witnesses be excluded during trial pursuant to Fed. R. Evid. 615.

B. DEFENDANT SHOULD BE PROHIBITED FROM ARGUING PUNISHMENT, EDUCATION, HEALTH, AGE, FAMILY CIRCUMSTANCES, AND FINANCES TO THE JURY

Defense counsel may wish to raise potential penalties Defendant faces if convicted. Information about penalty and punishment draws the attention of the jury away from their chief function as the sole judges of the facts, opens the door to compromised verdicts, and confuses the issues to be decided. United States v. Olano, 62 F.3d 1180, 1202 (9th Cir. 1995). In federal court, the jury is not permitted to consider punishment in deciding whether the United States has proved its case against the defendant beyond a reasonable doubt. 9th Cir. Crim. Jury Instr. §7.4 (2003). Any such argument or reference would be an improper attempt to have the jury unduly influenced by sympathy for the defendant and prejudiced against the Government. See 9th Cir. Jury Inst. § 3.1 (2000). Therefore, the United States hereby moves *in limine* for the Court to order defense counsel not to mention any potential penalty or punishment to the jury or to solicit testimony regarding the same.

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Likewise, the defense should be prohibited from making reference to or arguing about Defendant's education, health, age, family circumstances, and finances. Defendant may attempt to introduce evidence designed to improperly arouse the sympathy of the jury, such as evidence of her age or personal background. The court should preclude Defendant from presenting such evidence under Federal Rules of Evidence 401, 402, and 403.

Testimony about Defendant's education, health, age, family circumstances, and finances are patently irrelevant to the issues in this case. Fed. R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 402 states the evidence "which is not relevant is not admissible." Testimony about Defendant's age and personal background are of no consequence to the determination of any essential facts in this case. Likewise, a defendant's right to testify is not absolute. That right does not authorize a defendant to present irrelevant testimony. See United States v. Adams, 56 F.3d 737 (7th Cir. 1995) (proper to exclude video of defendant's children opening gifts on Christmas because video would only develop sympathy for accused and would not establish defendant's whereabouts two days earlier).

Furthermore, the introduction of such evidence would violate Fed. R. Evid. 403. That rule allows a court to exclude relevant evidence where the danger of unfair prejudice or confusion of the issues outweighs the probative value of such evidence. A trial court has "wide latitude" to exclude such prejudicial or confusing evidence. See United States v. Saenz, 179 F.3d 686, 689 (9th Cir. 1999). The admission of testimony about defendant's education, health, age, and finances will tend "to induc[e] decisions on a purely emotional basis . . ." in violation of Fed. R. Evid. 403. See Fed. R. Evid. 403 Advisory Committee Notes; United States v. Ellis, 147 F.3d 1131, 1135 (9th Cir. 1998). Juries should not be influenced by sympathy. 9th Cir. Crim. Jury Instr. § 3.1 (2003).

Thus, the Government moves *in limine* for the court to order defense counsel not to introduce such testimony from Defendant or from any witnesses.

C. ADMIT EXPERT TESTIMONY BY GOVERNMENT WITNESSES

The United States expects to present expert testimony by Lisa Kitlinski, a United States Drug Enforcement Administration ("DEA") chemist, who determined the substance found in Defendant's vehicle was cocaine. The United States also expects to present testimony of United States Bureau of Immigration and Customs Enforcement ("ICE") Special Agent Roger Carr, who has determined the wholesale and retail values in Tijuana and San Diego County, in or about April 2008, of the cocaine seized from Defendant's vehicle. The Court should admit expert testimony by these two witnesses.

If specialized knowledge will assist the trier-of-fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. It is within the sound discretion of the trial judge to determine whether or not expert testimony would assist in understanding the facts at issue. United States v. Alonso, 48 F.3d 1536, 1539 (9th Cir. 1995); United States v. Lennick, 18 F.3d 814, 821 (9th Cir. 1994). An expert's opinion may be based on hearsay or facts not in evidence where the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703. An expert may provide opinion testimony even if it embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704.

The United States expects to present the testimony of Lisa Kitlinski that the substance seized from the vehicle was cocaine. At trial, the United States will be required to prove that Defendant knowingly brought cocaine into the United States and that Defendant knew it was cocaine, or some other prohibited drug. See 9th Cir. Crim. Jury Instr. § 9.27 (2003). The United States will also have to show that Defendant knowingly possessed cocaine. See 9th Cir. Crim. Jury Instr. § 9.13 (2003). Defendant's importation and possession of cocaine are elements of the offenses she is charged with. Thus, expert testimony that the substance seized from Defendant's vehicle was cocaine is relevant and should be admitted.

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In addition, the United States intends to present expert testimony by ICE Special Agent Roger Carr regarding the wholesale and retail values of the cocaine seized from Defendant's vehicle. Specifically, he will testify as to the wholesale and retail price range for approximately 12.45 kilograms of cocaine in the border region of Mexico and in San Diego, California. Special Agent Carr will also testify about how cocaine is consumed by the typical end-user. The expert will testify that the quantity of narcotics seized from Defendant's car was far greater than a consumer would possess for personal use.

The value expert's testimony on the wholesale and retail values of the narcotics seized in this case is relevant to Defendant's intent to distribute. See United States v. Savinovich, 845 F.2d 834, 838 (9th Cir. 1988) (finding that price and quantity of narcotics is relevant to defendant's intent to distribute). The Ninth Circuit has upheld the admissibility of expert testimony as to the retail value of drugs. See United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994) ("DEA agents can testify as to the street value of narcotics . . . and counsel can argue reasonable inferences from it.") (citation omitted); see also United States v. Ramirez, 176 F.3d 1179, 1181 (9th Cir. 1999) (finding it "reasonable to infer that a $37,120 shipment of marijuana would not be entrusted to the driver of the vehicle without the driver's knowledge"). Accordingly, no basis exists for excluding this testimony as to the value of the drugs.

It is expected that Special Agent Carr will base his opinions on his experience investigating these types of cases, as well as his experience interviewing drug traffickers, debriefing confidential informants, and discussing drug value information with other agents.

The United States does not intend to introduce expert testimony regarding structure in its case-in-chief. If the United States intends to present such evidence in rebuttal, it will do so consistent with United States v. Vallejo, 237 F.3d 1008, *as amended*, 246 F.3d 1150 (9th Cir. 2001) and United States v. Valencia-Amezcua, 278 F.3d 901, 909 (9th Cir. 2002). *See also* United States v. Pineda-Torres, 287 F.3d 860, 866 (9th Cir. 2002) ("We have held that limited drug structure testimony is admissible in drug importation cases when the defense opens the door. . .")

D. THE COURT SHOULD ADMIT DOCUMENTS SEIZED AT THE TIME OF DEFENDANT'S ARREST

Ninth Circuit law is clear that the documents seized from a defendant at the time of arrest may properly be admissible against defendant. See Fed. R. Evid. 801(d)(2)(B); United States v. Carrillo, 16 F.3d 1046, 1048-1049 (9th Cir. 1994) (holding that the writings on a piece of paper found in the defendant's pocket after arrest were admissible as adoptive admissions because the defendant both possessed the document and acted in accordance with what was written thereon.)

At the time of Defendant's arrest, she had the registration document for the vehicle she was driving. The registration bears her name. In its prosecution, the United States should be permitted to use this registration document which was taken from Defendant at the time of her arrest. The registration should be admissible against Defendant because it was found in her possession at the time of arrest, and she acted consistent with the contents of the document: She was the driver and sole occupant of the vehicle.

E. THE GOVERNMENT SHOULD BE ALLOWED TO BRING THE DRUGS INTO THE COURTROOM DURING TRIAL

The United States intends to introduce evidence of the approximately 12.45 kilograms of cocaine discovered in the vehicle when Defendant entered the United States. This includes the seized packages of cocaine. The evidence is relevant both to proving the substance of the narcotics found in Defendant's vehicle and, given the bulk and size of the packages, Defendant's knowledge of the narcotics in her vehicle. The probative value of such evidence outweighs any risk of unfair prejudice. See Fed. R. Evid., 401-403.

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F. THE COURT SHOULD NOT REQUIRE THE UNITED STATES TO PROVE EACH LINK IN THE CHAIN OF CUSTODY OF THE NARCOTICS

As noted above, the United States intends to introduce evidence of the approximately 12.45 kilograms of cocaine discovered in the vehicle when Defendant entered the United States. Evidence of the cocaine, which was first seized by inspectors and later tested by a DEA chemist, is admissible because there is a presumption of regularity in its handling by these public officials and the testimony of these witnesses will show that the narcotics have not changed in a material way since its seizure. The United States should not be required to prove every link in the chain of custody in order for narcotics evidence to be admissible.

The test of admissibility of physical objects connected with the commission of a crime requires a showing that the object is in substantially the same condition as when the crime was committed (or the object seized). Factors to be considered are the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of inter-meddlers tampering with it. There is, however, a presumption of regularity in the handling of exhibits by public officials. United States v. Kaiser, 660 F.2d 724, 733 (9th Cir. 1981), cert. denied, 445 U.S. 856 (1982), overruled on other grounds, United States v. DeBright, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc). If this Court finds that there is a reasonable possibility that a piece of evidence has not changed in a material way, the Court has the discretion to admit the evidence. Id. The United States is not required, in establishing chain of custody, to call all persons who may have come into contact with the piece of evidence. Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960).

The cocaine seized from the vehicle was marked, photographed, secured, and transported in accordance with standard operating procedures. Because the narcotics have not changed in a material way and has been properly preserved, the United States should not have to prove every link in the chain of custody from the time it was seized through the time of trial.

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G. TESTIMONY OF CHARACTER WITNESSES

In introducing positive character evidence, a defendant must restrict himself to evidence regarding "law-abidingness" and honesty. A defendant may not introduce evidence concerning specific instances of good conduct, lack of a prior record, or propensity to engage in specific bad acts such as drug smuggling or distribution. United States v. Hedgecorth, 873 F.2d 1307, 1313 (9th Cir. 1987) ("[W]hile a defendant may show a characteristic for lawfulness through opinion or reputation testimony, evidence of specific acts is generally inadmissible.") (citations omitted); United States v. Barry, 814 F.2d 1400, 1403 (9th Cir. 1987); Government of Virgin Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985) ("[T]estimony that one has never been arrested is especially weak character evidence.").

Any character evidence Defendant seeks to introduce at trial, therefore, should be limited to evidence regarding his law-abidingness and honesty. Character evidence beyond the scope of these two traits would be inappropriate.

H. THE COURT SHOULD PRECLUDE EVIDENCE OF DURESS OR NECESSITY

Defendant should be precluded from presenting evidence or argument that he imported narcotics due to duress or necessity. Courts have specifically approved the pretrial exclusion of evidence relating to a legally insufficient duress defense on numerous occasions. See United States v. Bailey, 444 U.S. 394 (1980) (addressing duress); United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996), cert. denied, 522 U.S. 826 (1997) (addressing duress). Similarly, a district court may preclude a necessity defense where"the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1992).

In order to rely on a defense of duress, Defendant must establish a prima facie case that:

(1) Defendant committed the crime charged because of an immediate threat of death or serious bodily harm;

(2) Defendant had a well-grounded fear that the threat would be carried out; and

(3) There was no reasonable opportunity to escape the threatened harm.

United States v. Bailey, 444 U.S. 394, 410-11 (1980); Moreno, 102 F.3d at 997. If Defendant fails to make a threshold showing as to each and every element of the defense, defense counsel should not burden the jury with comments relating to such a defense. See, e.g., Bailey, 444 U.S. at 416.

A defendant must establish the existence of four elements to be entitled to a necessity defense:

(1) that he was faced with a choice of evils and chose the lesser evil;

(2) that he acted to prevent imminent harm;

(3) that he reasonably anticipated a causal relationship between his conduct and the harm to be avoided; and

(4) that there was no other legal alternatives to violating the law.

See Schoon, 971 F.2d at 195; United States v. Dorrell, 758 F.2d 427, 430-31 (9th Cir. 1985). A court may preclude invocation of the defense if "proof is deficient with regard to any of the four elements." See Schoon, 971 F.2d at 195.

The United States hereby moves for an evidentiary ruling precluding defense counsel from making any comments during the opening statement or the case-in-chief that relate to any purported defense of "duress" or "coercion" or "necessity" unless Defendant makes a prima facie showing satisfying each and every element of the defense. The United States respectfully requests that the Court rule on this issue prior to opening statements to avoid the prejudice, confusion, and invitation for jury nullification that would result from such comments.

I. PRECLUDE EXPERT TESTIMONY BY DEFENSE WITNESSES

Defendant must disclose written summaries of testimony that Defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial. The summaries are to describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. Defendant here has not provided notice of any expert witness, nor any reports by expert witnesses. Accordingly, Defendant should not be permitted to introduce any expert testimony if she fails to disclose such information prior to trial.

If the Court determines that Defendant may introduce expert testimony, the United States requests a hearing to determine this expert's qualifications and relevance of the expert's testimony pursuant to Fed. R. Evid. 702 and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999). See United States v. Rincon, 11 F.3d 922 (9th Cir. 1993) (affirming the district court's decision to not admit the defendant's proffered expert testimony because there had been no showing that the proposed testimony related to an area that was recognized as a science or that the proposed testimony would assist the jury in understanding the case); see also United States v. Hankey, 203 F.3d 1160, 1167 (9th Cir.), cert. denied, 530 U.S. 1268 (2000).

J. THE COURT SHOULD ADMIT TECS INFORMATION

The Government seeks to introduce limited TECS information showing that, prior to her arrest, Defendant entered the United States from Mexico in the load vehicle on several prior occasions in the month preceding her arrest. For at least two prior crossings in the load vehicle, Antonia Franco-Nunez accompanied Defendant. This evidence is relevant to demonstrate Defendant's connection with the vehicle and to establish her knowledge that she was smuggling narcotics.

TECS evidence is admissible as a public record under Federal Rule of Evidence 803(8) unless the sources of information or other circumstances indicate lack of trustworthiness. United States v. Orozco, 590 F.2d 789, 794 (1979). In Orozco, the Ninth Circuit Court held that nothing about the TECS recording procedure indicated a lack of trustworthiness. Id. at 794. Specifically, this Court noted that, "[t]he customs agents have no motive to fabricate entries into the computer and the possibility of an inaccurate entry is no greater here than it would be in any other recording system." Id. at 794. Although this information constitutes a public record, in an abundance of caution, the Government has given notice to Defendant that CBP Officer Ted Swartzbaugh will provide expert testimony concerning the operation of TECS and the records pertaining to Defendant's prior crossings in the load vehicle.

K. THE COURT SHOULD ADMIT RULE 404(B) EVIDENCE

In an abundance of caution, the Government also seeks to introduce evidence of these prior crossings under Federal Rule of Evidence 404(b).

Following her arrest, Defendant admitted that "Jorge" was to pay her $600 total to cross the vehicle into the United States and return it to Mexico. This apparently was her fifth trip for Jorge, though Defendant claimed she thought she was only smuggling currency southbound. Franco, however, whom Defendant claims accompanied her three of the prior trips, stated that Defendant initially solicited more money from Jorge because of the possibility that Jorge might put "something" in the vehicle and because she could "get arrested at the border." According to Franco, Defendant was later informed she would be paid $800. Franco also stated that, on one of the previous trips with Defendant to the Los Angeles area, Defendant had offered to pay Franco $200 for her company. Defendant later had misgivings about the arrangement, though, because the vehicle was registered in Defendant's name and she would have to "take the fall" if anything happened.

When offered a purpose other than propensity, evidence of other acts is admissible under Rule 404(b) where: (1) the act tends to prove a material point; (2) it is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; (4) the act is similar to the offense charged; and (5) the act's probative value is not substantially outweighed by unfair prejudice under Rule 403. United States v. Romero, 282 F.3d 683, 688 (9th Cir. 2002) (citation omitted). Application of these five factors to Defendant's smuggling efforts for Jorge weigh heavily in favor of admissibility.

First, Defendant's prior involvement in smuggling activity for Jorge is material to the issues of knowledge, intent, plan, identity and absence of mistake. See United States v. Hodges, 770 F.2d 1475, 1479 (9th Cir. 1985) (other act evidence may be introduced if the Government establishes its relevance to an actual issue in the case). In particular, Defendant's statements to others in connection with these prior trips for Jorge help establish that Defendant knew or was deliberately ignorant of the fact that, on April 5, 2008, cocaine had been secreted in her vehicle.

Second, the "other act" evidence the Government seeks to introduce is not too remote in time. In fact, Defendant's prior trips for Jorge in the load vehicle began only the month before the instant offense. There is no bright-line rule requiring the Court to exclude other act evidence after a certain period of time has elapsed, United States v. Brown, 880 F.2d 1012, 1015 n. 3 (9th Cir. 1989), and one month is not impermissibly remote under any standard. See, e.g., United States v. Johnson, 132 F.3d 1279, 1283 (9th Cir. 1997) (upholding admission of other act that occurred 13 years before charged crime); United States v. Ross, 886 F.2d 264, 267 (9th Cir. 1989) (same).

Third, the Government will present sufficient evidence of Defendant's prior crossings in the load vehicle. Other act evidence under Rule 404(b) should be admitted if "there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." Huddleston v. United States, 485 U.S. 681, 685 (1988). The testimony of a single witness satisfies the low-threshold test of sufficient evidence for purposes of Rule 404(b). See United States v. Dhingra, 371 F.3d 557, 566-57 (9th Cir. 2004). Here, the Government will satisfy this threshold through TECS information, Franco's testimony, and Defendant's own statements.

Fourth, Defendant's prior smuggling endeavors for Jorge are similar to the instant offense.

Finally, this evidence is highly probative and is "not the sort of conduct which would provoke a strong and unfairly prejudicial emotional response from the jury." United States v. Ramirez-Jiminez, 967 F.2d 1321, 1327 (1992) (emphasis added).

L. RENEWED MOTION FOR RECIPROCAL DISCOVERY

The United States renews its motion for reciprocal discovery. As of the date of the filing of these motions, Defendant has produced no reciprocal discovery. The United States requests that Defendant comply with Rule 16(b) of the Federal Rules of Criminal Procedure, as well as Rule 26.2, which requires the production of prior statements of all witnesses, except for those of

Defendant. Defendant has not provided the United States with any documents or statements. Accordingly, the United States intends to object at trial and ask this Court to suppress any evidence at trial which has not been provided to the United States.

IV

CONCLUSION

For the foregoing reasons, the United States respectfully requests that its motions *in limine* be granted.

DATED: August 18, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Aaron B. Clark
AARON B. CLARK
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff v. ANA BERENICE PALOS-MONTES, Defendant(s).	Case No. 08CR1726-LAB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, AARON B. CLARK, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of UNITED STATES' MOTIONS *IN LIMINE* on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Michelle Betancourt, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 2008.

s/ Aaron B. Clark
AARON B. CLARK